

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BOARD OF WATER AND SOIL RESOURCES

In the Matter of the Petition
for the Establishment of the
Mustinka-Rabbit River-Bois
de Sioux Watershed District
Filed on July 27, 1987

FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

The above-entitled matter came on for hearing before Peter C. Erickson, Administrative Law Judge, on January 11, 1988, in Wheaton.

Appearing on behalf of the Petitioners was Timothy E. J. Fox, Wilkin County Attorney, P. O. Box 214, Breckenridge, Minnesota 56520, and Jeanne L. Bringgold, Traverse County Attorney, P. O. Box 26, Wheaton, Minnesota 56296.

Appearing on behalf of Citizens Concerned for Water Management, Inc., a nonprofit corporation opposed to the formation of the District, was Stephen F.

Rufer, Rufer & Hefte, Attorneys at Law, 111 North Mill Street, P. O. Box 866, Fergus Falls, Minnesota 56537-0866. Appearing on behalf of the Dispute Resolution Committee of the Minnesota Board of Water and Soil Resources was Special Assistant Attorney General Paul Strandberg, 525 Park Street, S-200, St. Paul, Minnesota 55103. There were four Board members present at the hearing: Chairman Donald Ogaard, Loren Harste, William Cofell, and Jack Graba.

The record in this matter closed on February 10, 1988.

Notice is hereby given that, pursuant to Minn. Stat. sec. 14.61 the final decision of the Board shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Board. Exceptions to this Report, if any, shall be filed with the Minnesota Board of Water and Soil Resources, 90 West Plato Boulevard, First Floor, St. Paul, Minnesota 55107. The Board's next regularly scheduled meeting is set for March 23.

STATEMENT OF ISSUE

Have the petitioning counties demonstrated that the establishment of the proposed district would be for the public welfare and public interest and would serve the purposes of Minn. Stat. Chapter 112?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural History and Jurisdiction

1. On July 27, 1987, a petition seeking the establishment of a Mustinka-Rabbit River-Bois de Sioux watershed district was filed with the Minnesota

Water Resources Board. The Petition was signed by the chairman of the county boards of the counties of Wilkin, Traverse, Big Stone and Stevens. Attached to the Petition was an affidavit of service by mail of the Petition on the county auditors of Wilkin, Traverse, Stevens, Otter Tail, Grant and Big Stone Counties, as well as on the Commissioner of the Department of Natural Resources. Those were mailed on July 15, 1987.

2. On August 19, 1987, the Water Resources Board considered the Petition. The Board found the Petition sufficient, subject to receipt of proof of service on the Director of the Division of Waters of the Minnesota Department of Natural Resources. The Board granted the Director an extension of time to prepare his report, and directed its staff to begin the process for scheduling a hearing on the Petition.

3. On August 31, 1987, a copy of the nominating Petition, accompanied by an affidavit of service by mail on the Director of the Division of Waters of the Minnesota Department of Natural Resources, was filed with the Water Resources Board.

4. On October 27, 1987, the Director of the Division of Waters of the Department of Natural Resources filed his report on the Petition. The report concludes that the Department supports the formation of the proposed district because it would have the opportunity to provide coordinated water resource management over the entire hydrologic basin.

5. On November 30, 1987, a preliminary watershed map prepared by the Department of Natural Resources was filed with the newly created Minnesota Board of Water and Soil Resources.

6. On December 8, 1987, the Board issued its Notice of and Order for Hearing in this matter. The Notice set the hearing for January 11, 1988 in Wheaton, Minnesota.

7. On December 15, 1987, copies of the Notice of and Order for Hearing were mailed to the county auditors of Big Stone, Grant, Otter Tail, Stevens, Traverse and Wilkin Counties. Copies were also mailed to the mayors of cities and clerks of townships within the boundaries of the proposed district, to county soil and water conservation districts in the affected area, to legislators representing the affected area, to three newspaper editors in the affected area, and to various other interested individuals.

8. On December 16, and again on December 30, the Notice of and Order for Hearing was published in the Grant County Herald, accompanied by a map showing the boundaries of the proposed district. On December 17, and again on

December 24, the Notice and map were published in the Daily News of Wahpeton- Breckenridge, the Wheaton Gazette, the Morris Tribune, and the Northern Star.

Description_of the Proposed District

9. The proposed district is roughly rectangular in shape, and includes all of Traverse County, as well as portions of Wilkin, Otter Tail, Grant, Stevens and Big Stone Counties. It constitutes the drainage basins of Lake Traverse and the Bois de Sioux River. The major tributaries are the Mustinka River to the south and the Rabbit River to the north.

10. The area of the proposed district is approximately 1,435 square miles. This is broken down among the various counties as follows:

County	Square Miles	% of 'Total
Traverse	546	38 %
Grant	381	27
Wilkin	198	14
Stevens	144	10
Big Stone	103	7
Otter Tail	63	4
	1,435	100

11. The dominant geographical feature of the district is the very flat plain which was the bed of glacial Lake Agassiz. That flat plain covers approximately 80 percent of the proposed district. The remaining 20 percent consists of ridges (allegedly old beach lines) and "upland" areas to the east of the ridges. The ridges and upland areas are to the east of the flat plain.

12. The counties of Traverse and Wilkin have very few wetlands or lakes which can serve to hold water after spring snowmelt or a rainstorm. Parts of Wilkin and Traverse Counties had large shallow water basins in years past, but they were drained many years ago. On the other hand, the counties of Otter Tail, Grant, Stevens and, to a lesser extent, Big Stone have numerous water bodies ranging in size from only a few acres to several hundred acres. Most of the larger water bodies are above the ridge. Tr. 113.

13. Agriculture is the dominant use in virtually the entire area proposed for inclusion in the district. The land has been intensively drained over the years. One of the primary causes of the flooding (which will be discussed more fully below) is the piecemeal and unplanned nature of this drainage. As more and more acres have been taken from slough, pasture or hay into row crops, they have been drained without attention to the cumulative downstream effects. When larger county ditches or joint ditches were engineered in the past, they were not engineered to carry all the water which is now being placed in them. While the rivers are, for the most part, natural (there has been some channelization and cleaning), they suffer from the same

problem--inadequate capacity. They may have been adequate to carry the water that was placed in them in 1930, but they are not adequate to carry all the water that is being placed in them today.

Current Problems: Flooding

14. The extreme flatness of the Lake Agassiz basin causes large areas to be flooded by relatively small quantities of water. In the absence of roads, dikes, or other obstructions, water moves from field to field and section to section with relative ease. A pilot who had flown over the Rabbit River area during times of very high water found that the river was out of its banks by up to one and one-half miles. Tr. 45. Even in normal years, Wilkin County has 15 sites where highways and bridges are damaged each spring by the normal spring runoff. These sites will also be under water if rainfall in the area exceeds three inches. Tr. 14.

15. in serious flood years, up to 60 highways or bridges have been damaged in Wilkin County alone. Years such as 1969, 1978, 1979, 1984 and 1986 have all presented serious financial problems for Wilkin County and its townships. Tr. 15 and 70.

16. Traverse County has experienced similar damage to its highways and bridges. In 1969, there was \$80,061 in documented damages. In 1978, there was \$119,307; in 1984, \$55,100; in 1986, \$41,155. Tr. 94.

17. Similar damages have been imposed upon farmers and town people. The record is replete with photographs and testimony showing whole fields covered by water. Many of these flood problems have occurred after crops have been planted, oftentimes destroying the crop entirely. Ex. 10, p. 37. The Rabbit River came out of its banks seven times, for example, in the bad year of 1986. Tr. 56. In the city of Breckenridge, the Red River met or exceeded flood stage four different times that year. Tr. 33.

18. Long term residents report that prior to 1950, flooding was not too much of a problem (with some notable exceptions, such as 1916). But since 1950, flooding has become more intense and more frequent. Tr. 80. Some say there is too much water coming too fast, while others say that there is probably the same amount of water, but it's coming much faster than it used to. Tr. 81 and 109. It is found that there is both more water, and it is coming faster. The primary reason for this change is the evolution of high intensity agricultural practices which permit the growing of row crops on well drained soils which, in the past, were too wet to support them. Drainage has permitted these lands to become far more productive, but it has had a negative effect on the productivity of downstream lands. In summary, flooding is a problem, and artificial alteration of the natural drainage system is one of the causes.

Other Current Problems

19. Erosion caused by flood waters is a serious problem. A supervisor on the Traverse County Soil and Water Conservation District Board characterized the erosion problem in Traverse County as "massive". Tr. 103. The erosion is a direct result of the quantity of water and the velocity at which it travels.

20. Siltation is a serious problem in Lake Traverse, the Bois de Sioux and Red Rivers, and at least some of the rivers and ditches that feed them. In February of 1985, for example, the City of Breckenridge contacted the Army Corps of Engineers to inquire about the possibility of dredging the Red River in order to increase its capacity. The Corps responded with the suggestion that the City work with local soil conservation service units to reduce the amount of erosion upstream of the river. Ex. 9 and Tr. 95.

21. The Department of Natural Resources has documented fish kills in Lake Traverse which are the result of excessive algae. Non-point source runoff is a common contributor to algal populations. Heavy rains will frequently cause nutrients to be washed away along with the eroded soil, delivering the nutrients to algae and other organisms.

22. There is also concern about groundwater quality. At least one person who recently dug a new well to an 86-foot depth has found that excessive nitrates in the water make it unsuitable for human consumption.

23. The crop losses and soil erosion which result from flooding have caused landowners to seek reduced tax valuations from their local assessors. Assessors have lowered valuations, but township boards note that this occurs at the same time that they need to raise money for road and bridge repairs. Tr. 109.

24. Antagonisms, disputes and even litigation have arisen over water problems in this area. Landowners who are paying for ditches do not mind paying their fair share, but if the ditch is carrying water from upstream landowners who are not being assessed, those who are being assessed do object. While in some cases landowners have been able to cooperate across county boundaries -- as happened between Wilkin and Grant Counties in connection with County Ditch 20 (see, Tr. 19 and 25) -- other situations have resulted in litigation and unpleasant relations. Tr. 25 and 110.

History of Attempted Solutions

25. Approximately 25 years ago, a committee was formed to try to establish a watershed district. The project was dropped, however, in exchange for promises of informal cooperation. Tr. 75 and 78.

26. In August of 1984, the Wilkin County Board sent out a letter to adjoining counties soliciting their ideas about a possible watershed district. Ex. 31. All expressed interest, and in November of 1984, an initial meeting was held in Breckenridge.

27. During 1985, engineers and others were consulted about the feasibility of a watershed district. One of the ideas that arose from that consultation was that a district which encompassed only the Rabbit River Watershed was probably too small to be effective. Tr. 22.

28. In July of 1986, Senator Charlie Berg organized a meeting to hear complaints about Lake Traverse, and in September of 1986, the Corps sponsored a public meeting to attempt to define the problems. These meetings led to the Problem Appraisal Report, Ex. 10.

29. In January of 1987, the Corps of Engineers issued the Problem Appraisal Report on the Lake Traverse Reservoir Operation Plan. This report focused upon the details of the operations of the White Rock Dam and the Reservation Control Dam, but it verifies many of the problems outlined above. The report noted:

Water resources experts tend to agree that extensive drainage, such as found in the flat glacial Lake Agassiz area, can affect downstream flood levels under certain conditions. Comprehensive watershed planning, management, and public education in the project area could help control ditching, drainage, and abuse of marginal and flood plain lands . . . Watershed districts should be activated to accomplish the planning and management needed. The Soil Conservation Service and state resources agencies can help watershed districts to plan and implement land-use measures and runoff retention projects.

30. In February of 1987, the Traverse County Board of Commissioners initiated the formal actions necessary to establish a watershed district, and meetings were held in the spring and summer of 1987 to refine the proposal.

31. In July of 1987, the Petition was filed with the Board.

Other Factors Favoring the Establishment of the District

32. A watershed district would be able to coordinate water management across county lines, just as a county board is able to deal with problems that cross township lines. An obvious example of how this can be helpful occurs in connection with planning a ditch repair project. In a major project, the engineer is going to want to know how much water must be carried at different points along the ditch. A county board can figure out, with some certainty, how much water will be contributed by lands in the county. It is helpless, however, to determine how much water will be contributed by lands on the other side of the county line. It has no control over ditch work done by upstream counties or private landowners upstream. In a watershed district, the engineer can gather data and make projections on both sides of the county line. Tr. 14, 21, 50-51. Also, in a watershed district, an engineer can consider options that involve more than one county, and so the options presented can be those that are most technically feasible, without the limitations imposed by political boundaries. Tr. 106.

33. Joint powers agreements or joint county ditches are both alternatives to a watershed district. There are a fair number of joint ditches already in existence. There are ditches between Wilkin and Grant, Wilkin and Traverse, Wilkin and Otter Tail, Traverse and Big Stone, Traverse and Grant, and even one involving Traverse, Wilkin and Grant. Tr. 16, 51, 97, 98 and letter dated January 19 from Steven Raguse. Sometimes these units have worked well, and other times they have not. Tr. 97-98. Their scope, however, is limited to one ditch system, rather than a whole drainage basin. While they certainly can solve an immediate problem, they may just pass it on downstream, and not contribute to a basin-wide solution.

34. A watershed district can deal with a whole host of water-related problems, not just flooding. Water quality problems involving algae in Lake Traverse or nitrates in drinking water are caused by water flows well beyond the scope of any one ditch or ditch system. While they may even be caused by factors outside the boundaries of the proposed district, a district is better equipped to deal with them than a joint ditch board.

35. Watershed boards are made up of managers who, by law, do not hold other public offices. Oftentimes they are able to devote more time and attention to water problems than can reasonably be expected from a county board, which must deal with many other issues. The minutes of the Grant County Board in the record reflect frequent water-related discussions and decisions, but they are a very small percentage of the total work of the County Board. There are only so many meetings that officeholders can attend, and a watershed board allows others to share the work presently being borne by the county board. Tr. 16 and 30.

Other Factors Opposing the Establishment of the District

36. There is substantial opposition to the Petition from landowners in three of the affected counties. A watershed district was opposed by the

County Boards of Otter Tail and Grant Counties. Individuals from those counties stated they had no objection to Wilkin and Traverse forming a district, if they wanted to, but Otter Tail and Grant did not want it to include any of their lands. Big Stone County was one of the counties that signed the Petition in June of 1987. However, by letter dated January 26, 1988, the Big Stone County Board indicated a change of position. Petitions opposing the establishment of the district were signed by over 80 percent of the resident freeholders in Big Stone County whose lands would be included within the boundaries of the proposed district. Had the county board known that there was such strong opposition, it would not have joined in the signing of the Petition. The county board recognized, however, that the law specifically prohibits individuals, or a county, from withdrawing their names from a petition once it has been filed, unless all other petitioners consent to the withdrawal.

37. The rate of ditching to reclaim wasteland for agricultural purposes will not be as great in the future as it has been in the past, because there just isn't that much land left that can be legally and economically drained. In other words, it is wrong to assume that the increase in flows during the last 30 years, for example, will continue to get even bigger again. Many of the lands which are most attractive for drainage are protected by long-term easements or outright legal prohibitions against drainage. In Grant County, for example, the statewide inventory process for water bodies and wetlands identified a total of 188 basins which are protected against drainage. Tr. 114 and Ex. 104. The protection, however, is dependent upon a state law which can be changed whenever the legislature chooses to. At the present time, the lower limit for protection is ten acres. There is nothing to say the legislature could not change that number. But under current law, those water bodies and wetlands are protected from drainage. Additional protection comes from federal farm programs which have recently included provisions conditioning participation upon an agreement not to create additional cultivated acreage ("sodbuster-swampbuster"). This, too, may change in the future, but, for the present, it provides an incentive for farmers not to drain additional lands. Finally, additional drainage is limited by the practicalities of cost: at some point it becomes too expensive to drain in comparison to the expected return from the land. Digging 30 or 40 feet down for any substantial distance is simply not economical under current conditions. Tr. 141.

38. There are already a large number of governmental entities which have control over one or more parts of the total water management picture: the Army Corps of Engineers, the State's Department of Natural Resources, the counties, soil and water conservation districts, joint ditch boards, individual ditch boards, the Pollution Control Agency, and others. A watershed board has the

possibility of overlapping and duplicating work already being done at taxpayer expense. Tr. 130 and Petitions, Ex. 100. As the DNR Director's report noted, the creation of a district does not diminish the authority of other agencies to carry out their jobs, unless there is a formal agreement to transfer responsibilities. If the problems of duplication and inconsistent regulation are to be avoided, communication channels must remain open and the district must limit its role to that assigned to it by law. If not, the fears of duplication expressed by the opponents can, in fact, come true.

39. A watershed district has the power to tax and the power of eminent domain. Both of these are powers traditionally reserved for elected units of

government, such as towns, counties, or the State. The board of managers is appointed, not elected and there is no easy way for citizens to cause a manager to be removed from office. Citizens may petition to increase the number of managers and they may petition for the termination of a watershed district at any time after five years from the date of its formation. As a practical matter, however, citizens do not have the direct control over watershed managers that they have over elected officials. On the other hand, this "distance" may result in the managers taking a broader view towards problems and solutions. One of the criticisms leveled at existing joint ditch boards was the parochial attitude that some had exhibited in the past. Tr. 97.

Managers

40. The original Petition proposed that the Board of Managers consist of nine members. It contained a list of 20 nominees for those nine positions. In addition to that list, two other persons have indicated a desire to serve as a manager. The first is Nick Daly, Route 1, Box 66, Donnelly, Minnesota 56235. Donnelly is in Stevens County. The second is Dennis Stock. Stock was nominated by a unanimous motion of the Otter Tail County Board on May 28, 1987. Tr. 142.

41. The Board is free to apportion the managers among the various counties in whatever form it chooses. In addition, the Board is free to set the number of managers at any number between three and nine. If the Board decided to go with nine managers as proposed in the Petition, and if the Board desired to apportion the managers as closely as possible to the percentage of land in the district (see Finding 10), but still give each county at least one manager, the apportionment would be as follows:

County	% of Land	of Managers
Traverse	38 %	3
Grant	27	2
Wilkin	14	1
Stevens	10	1
Big Stone	7	1
Otter Tail	4	1-
	100	9

An alternative available to the Board would be to determine and identify manager areas within the territory of the district. Minn. Stat. 112.42, subd. 3(d).

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The nominating Petition is valid in all respects. It meets the tests set forth in both Minn. Stat. 112.37 (1986) and 112.37 (1987 Supp.).

2. Due, timely and proper notice of the hearing was given. All other relevant requirements of law or rule have been fulfilled. The Board and the Administrative Law Judge do have jurisdiction to determine the issues herein.

3. The establishment of a watershed district as proposed would be for the public welfare and public interest and would serve the purposes of Minn. Stat. ch. 112, particularly sec. 112.3b, subds. 2 (1), (2), (3), (5), (6), (7), (9), (10), (11), (13) and (14) (1987 Supp.).

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Board establish the Mustinka-Rabbit River-Bois de Sioux Watershed District, fix the boundaries thereof as proposed in the original Petition, and name the first Board of Managers of the District.

Dated this 11th day of March, 1988.

PETER C. ERICKSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded, With Transcript Prepared By Jane L. Hosman.

MEMORANDUM

The boundaries of the proposed district were based upon science (hydrology) rather than on politics. It would have been easier for the Petitioners had they excluded lands in Grant and Otter Tail Counties in order to avoid the opposition that they must have known would come from those counties. That, however, would have been short-sighted and self-defeating. It is clear from the record that there have been a number of "ridge cuts" and tiles which allow water to flow from east to west across county lines. See, for example, Tr. 26, 61-62, and 83. Of course, a great deal of the water that is impacting the low-lands comes from the lowlands themselves; but there is no evidence as to what percentage comes from the upland and what percentage comes from the lowland, nor does it matter. What does matter is that there be a coordinated effort throughout the entire hydrologic basin to control the waters that are causing the flooding, erosion, siltation, ground water and water quality problems. Drawing the boundaries on a scientific basis, rather than on a political basis,

at least gives the proposed district a chance at getting a handle on the prob-
lems. A different administrative law judge once recommended against the forma-
tion of a district because he believed the boundaries had been drawn improperly
in order to exclude opponents of the proposed district. See, In the Matter of
the Petition for the Establishment of the Rice-Koronis Watershed District
(Counties of Stearns, Meeker and Kandiyohi), OAH Docket No. WRB-84-003-AK.
Petitioners are commended for not taking that approach in this case.

P.C.E.

